STATE OF DELAWARE
THE COURTS OF THE JUSTICES OF THE PEACE
820 North French Street 11th Floor
Wilmington, Delaware 19801

NORMAN A. BARRON
Chief Magistrate

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LEGAL MEMORANDUM 82-97

TO: ALL JUSTICES OF THE PEACE
STATE OF DELAWARE

FROM: NORMAN A. BARRON
CHIEF MAGISTRATE

DATE: AUGUST 17, 1982

RE: CARRYING A CONCEALED DANGEROUS INSTRUMENT

Justices of the Peace have jurisdiction to hear, try and finally determine a charge of Carrying a concealed dangerous instrument in violation of 11 Del.C., §1443 when the incident is alleged to have occurred after July 2, 1982.[1]

Eleven Del.C., §1443 states as follows:

> "§ 443. Carrying a concealed dangerous instrument: class A misdemeanor.
>
> (a) A person is guilty of carrying a concealed dangerous instrument when he carries concealed a dangerous instrument upon or about his person.
>
> (b) It shall be a defense that the defendant was carrying the concealed dangerous instrument for a specific lawful purpose and that the defendant had no intention of causing any physical injury or threatening the same.

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[1] See Legal Memorandum 82-92, dated July 16, 1982.

Carrying a concealed dangerous instrument is a class A misdemeanor."[2]

Eleven Del.C., §222(4) defines a dangerous instrument as follows:

> "(4) 'Dangerous instrument' means any instrument, article, or substance which, under the circumstances in which it is used, attempted to be used, or threatened to be used, is readily capable of causing death or serious physical injury."[3]

Eleven Del.C., §222(5) defines a deadly weapon as follows:

> "(5) 'Deadly weapon' includes any weapon from which a shot may be discharged, a knife of any sort (other than an ordinary pocketknife carried in a closed position), switchblade knife, billy, blackjack, bludgeon, metal knuckles, slingshot, razor, bicycle chain or ice pick. For the purpose of this definition, an ordinary pocketknife shall be a folding knife having a blade not more than 3 inches in length."

* * * * *

In order to find a defendant guilty of Carrying a concealed dangerous instrument, you, as the trier of fact, must be satisfied that each of the following elements have been proven beyond a reasonable doubt:

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[2]The Commentary to §1443 states, in part, that:
"This section enacts class [A misdemeanor] penalties for carrying a concealed dangerous instrument. . . . Penalties for this activity were not available under the former law, but were thought desirable in view of the potential harm. The section provides a defense for a person carrying a concealed dangerous instrument for a lawful purpose and without intention of causing or threatening physical injury."

[3]Serious physical injury is defined at 11 Del.C., §222(20).

1. The instrument, article or substance was a dangerous instrument.

a. When the instrument is a deadly weapon as defined under 11 Del.C., §222(5), there is no need for the State to prove that the instrument was used, attempted to be used or was threatened to be used and when so used, attempted to be used or threatened to be used was capable of causing death or serious physical injury. This is so because a deadly weapon is a dangerous instrument per se.

b. When the instrument is not a deadly weapon as defined under 11 Del.C., §222(5), the State must prove that the instrument was used, attempted to be used or was threatened to be used and when so used, attempted to be used or threatened to be used was capable of causing death or serious physical injury. Only then may such instrument be considered a dangerous instrument under 11 Del.C., §222 - .

2. The dangerous instrument was concealed;

3. The defendant had knowledge of its presence and control over it, and;

4. The dangerous instrument was immediately available and accessible to him.[4]

If so satisfied, the defendant should be found guilty of carrying a concealed dangerous instrument. If not so satisfied, or

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[4] See, Dubin v. State, Del.Supr., 397 A.2d 132 (1979); Ross v. State, Del.Supr., 232 A.2d 97 (1967). Both cases are discussed infra.

if a reasonable doubt exists as to any of the elements set forth above, the defendant should be found not guilty.

* * * * *

Delaware case law is helpful in answering the following questions:

1. What constitutes concealment?

2. What is a dangerous instrument?

3. What constitutes a valid defense under §1443(b); and

4. When is a dangerous instrument upon or about the person of the defendant?

Questions 2 and 3 became the principal issues in the case of Ciprick v. State, Del.Super., Cr.Act. No. 80-06-0433 (letter opinion by J. Stiftel dated July 13, 1981). President Judge Albert Stiftel's careful opinion in the Ciprick case warrants extensive quotation. In Ciprick, the defendant had been convicted of Carrying a concealed dangerous instrument in the Court of Common Pleas. He appealed to the Superior Court, contending, first, that the lower Court erred in determining that the knife which he was carrying at the time of his arrest was a "dangerous instrument", and, second, that the Court below erred in finding that the defendant had failed to establish the defense as provided in 11 Del.C., §1443(b). Judge Stiftel rejected both of the defendant's contentions as follows:

"I.

Appellant Ciprick was arrested on April 30, 1980 and initially charged with disturbing the peace. Pursuant to a lawful search, the

arresting officer discovered a knife in appellant's back pocket. The State charged appellant with violation of 11 Del.C., §1443, carrying a concealed dangerous instrument, along with other charges, in the Court of Common Pleas.

The Court below determined appellant was guilty of harassment and carrying a concealed dangerous instrument. The Court rejected appellant's argument that 11 Del.C., §222(4), defining 'dangerous instrument', modified 11 Del.C., §1443, to require the State to prove that appellant used, attempted to use, or threatened to use the knife to harm the victim. The Court held the State needed only to show the knife was readily capable of doing serious physical injury. Appellant challenges that ruling in this appeal.

The role of this Court in interpreting statutes is to give effect to the purpose and intent of the Legislature in enacting the statute. Mayor & Council of Wilmington v. Dukes, Del.Supr., 157 A.2d 789 (1960); Keys v. State, Del.Supr., 337 A.2d 18 (1975). A determination of the legislative intent is made by looking to the wording of the statute itself and by looking to extrinsic aids. Thomas v. Weltre, Del.Super., 381 A.2d 245 (1977). Among the most important extrinsic aids are the statute's legislative history and the legislative policy evidenced by other related statutes. Dooley v. Rhodes, Del.Supr., 135 A.2d 114 (1957). I therefore turn to the history of 11 Del.C., §1443.

Prior to the enactment of the 1973 Criminal Code, there was no separate statute prohibiting the carrying of a concealed dangerous instrument. Section 463 of Title 11 of the 1953 Delaware Code prohibited carrying a concealed deadly weapon. 'Deadly weapon' was judicially defined as a weapon likely to produce death. State v. Brooks, Del.Ct. of Oyer and Terminer, 84 A. 225 (1912). This definition included razors, chair legs, or any other object, depending upon its use. See State v. Iannuci, Del.Ct. of Gen. Sessions, 55 A. 336 (1903); Wisniewski v. State, Del.Supr., 138 A.2d 333 (1957). Under Section 463, a person convicted of carrying a concealed deadly weapon was subject to a fine up to $2,000, and imprisonment for up to 7 years.

In 1973, the Legislature enacted the Delaware Criminal Code, including Title 11, Sections 1442, 1443, and 222(4) and (5). Section 1442[5] prohibits carrying a concealed deadly weapon. Section 1443[6] prohibits carrying a concealed dangerous instrument. Carrying a concealed deadly weapon is a felony; carrying a concealed dangerous

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[5] 11 Del.C., §1442 provides:
'§1442. Carrying a concealed deadly weapon; class E felony.
A person is guilty of carrying a concealed deadly weapon when he carries concealed a deadly weapon upon his person without a license to do so as provided by §1441 of this title.
Carrying a concealed deadly weapon is a class E felony.'

[6] 11 Del.C., §1443 provides, in relevant part:
'§1443. Carrying a concealed dangerous instrument; class A misdemeanor.
(a) A person is guilty of carrying a concealed dangerous instrument when he carries concealed a dangerous instrument upon or about his person.
# # #
Carrying a concealed dangerous instrument is a class A misdemeanor.'

instrument is a misdemeanor. The difference between a deadly weapon and a dangerous instrument is spelled out in 11 Del.C., §222(4) and 5 . Section 222(5)'s definition of 'deadly weapon' lists various objects, including guns, knives (other than an ordinary pocket knife , and blackjacks. In contrast to the specific definition of 'deadly weapon', Section 222(4) defines 'dangerous instrument' as anything which could cause death or serious physical injury, under the circumstnaces in which it is used, attempted to be used, or threatened to be used.

According to the [Commentary] to §222, Delaware Criminal Code, p. 2-, 1973 Ed., it was the intention of the drafters to break down the crime of carrying a deadly weapon into two degrees:

> 'The definition of 'deadly weapon' is more narrow than that given in present Delaware law. The present Delaware meaning of that term is more like the meaning given to 'dangerous instrument'. The reason for this change is to provide the means of breaking down several of the crimes which previously had only one degree. Possession of a truly deadly weapon may be treated in such a scheme as a more serious offense than possession of a dangerous instrument.'

Appellant argues that the language of 11 Del.C., §222(4) requires the State to show that he used, attempted to use, or threatened to use his knife, before appellant may be convicted of carrying a concealed dangerous instrument. However, such a result would be contrary to the intent of the Legislature as illustrated by the history of 11 Del.C., §§1442 and 1443 as outlined above. The drafters of the 1973 Delaware Criminal Code obviously considered the

objects listed as deadly weapons in Section 222(5) as objects which had no purpose aside from the infliction of death or serious physical injury and as such, are dangerous instruments per se. The general definition of Section 222(4), on the other hand, is designed to cover those ordinary, everyday objects which may cause death or physical injury when used improperly. The requirement that the Court consider the circumstances in which the object is used, attempted to be used, or threatened to be used, serves as a guideline by which the Court may determine whether a defendant intended to use an ordinary object to cause injury. If the appellant was charged with carrying a concealed dangerous instrument for carrying a pencil in his pocket, it would be necessary for the State to prove that the appellant intended to use the pencil to cause the victim harm before the Court could convict the appellant. However, to require the State to make such a showing where the appellant was carrying a knife, other than an ordinary pocketknife, a 'deadly weapon', presumably dangerous per se, where the State decides to charge appellant with the lesser crime under 11 Del.C., §1443, is ludicrous. Such a requirement would undercut the obvious legislative purpose behind 11 Del.C., §§1442 and 1443 to avoid deadly attacks against others by surprise. Dubin v. State, Del.Supr., 397 A.2d 132 (1979).

A statute should be construed to render a practical meaning, not an absurd or unreasonable result. Asplundh Tree Expert Co. v. Clark, Del.Super., 369 A.2d 1084 (1975), aff'd Del.Supr., 372 A.2d 537 (1977); Opinion of the Justices, Del.Supr., 295 A.2d 718 (1972).

The Court below having determined the knife in question was not an ordinary pocketknife, and was indeed a 'deadly weapon', I find the State was not required to demonstrate the appellant used, attempted to use, or threatened to use the knife in order to convict appellant of carrying a concealed dangerous instrument in violation of 11 Del.C., §1443.

II.

Appellant also argues that the Court below erred in finding that the appellant failed to establish a defense pursuant to 11 Del.C., §1443(b).

11 Del.C., §1443(b) provides:

> '(b) It shall be a defense that the defendant was carrying the concealed dangerous instrument for a specific lawful purpose and that the defendant had no intention of causing any physical injury or threatening the same.'

This subsection of the statute provides the defendant with a defense if he can show he carried the instrument in question for a specific lawful purpose and that he did not intend to cause or threaten physical injury. [Commentary] to §1443, Delaware Criminal Code, p. 463 (1973 Ed.).

Appellant argues his uncontested testimony he used the knife for work and fishing established that appellant was carrying the knife for a lawful purpose. The absence of intent or threat to harm the victim is supposedly shown by the decision of the Court below to acquit appellant of the charges of offensive touching, terroristic threatening and aggravated harassment.

Looking to the record below, I note that although appellant testified he used the knife at work and while fishing, I find no testimony or evidence indicating appellant needed his knife at the seminar that morning, or at the bar that evening. Without such evidence, the trial Judge was within his discretion in determining appellant failed to establish a lawful purpose for carrying the knife. If there is sufficient evidence to support the findings of the trial Judge, the Superior Court, sitting in its appellate capacity, must affirm unless the findings are clearly wrong. State v. Cagle, Del.Supr., 332 A.2d 140 (1974).

Since appellant did not establish he was carrying the knife for a specific lawful purpose, it is unnecessary for me to consider whether appellant has shown he did not intend or threaten to harm the victim.

The conviction below of appellant Ciprick for carrying a concealed dangerous instrument is affirmed."

To reiterate, Judge Stiftel concluded that when a person is charged with carrying a concealed dangerous instrument and when the instrument is a deadly weapon as listed under 11 Del.C., §222(5), there is no requirement that the State prove use, attempted use or threatened use as an element of the offense. However, when the instrument is not a deadly weapon as listed under 11 Del.C., §222(5), the State must prove as an element of the offense the use, attempted use or threatened use of the instrument.

A year prior to the Ciprick case, our Supreme Court decided the case of Upshur v. State, Del.Supr., 420 A.2d 165 (1980). There, the defendant was arrested in a convenience store after a store employee observed him attempting to shoplift merchandise and called the police. Upon a pat-down search, the arresting officer discovered that the defendant was carrying a butcher knife with a 6 3/4 inch blade concealed in the waistband of his pants, covered by his shirt. He was charged with and convicted on Carrying a concealed deadly weapon in the Superior Court. He appealed contending, inter alia, that the trial Court erred in refusing to instruct the jury as to carrying a concealed dangerous instrument as a lesser included offense of carrying a concealed deadly weapon. The Supreme Court found no error:

> ". . . [D]efendant argues that the Trial Judge erred in not giving the requested instruction to the jury that carrying a concealed deadly instrument (§1443) is a lesser offense included in carrying a concealed deadly weapon (§1442). A reading of the substantive statutes and the underlying definitions reveals that §1443 is not a lesser included offense of §1442. Section 1442 requires the possession of a concealed deadly weapon without regard to an unlawful purpose or intention or threat to cause harm. Section 1443, by incorporating the definition of dangerous instrument from §222(4), is inextricably tied to the use of the weapon and requires a showing that the instrument was 'used, attempted to be used, or threatened to be used' to cause physical injury. Thus the latter weapons charge (§1443) is not 'established by proof of the same or less than all the facts required to establish the

> commission of the offense charged' and is not, therefore, a lesser included offense of §1442. 11 Del.C., §206(b) (1).[7] The facts adduced at trial did not prove or go toward proof of any use, attempted use or threatened use of the weapon. Therefore, it was proper for the Judge to refuse to instruct the jury on the elements of §1443."

While seemingly at odds, the Ciprick case and the Upshur case are reconciliable, in my view. Remember, in Ciprick, the defendant was charged with carrying a concealed dangerous instrument. In Upshur, the defendant was charged with carrying a concealed deadly weapon. Although carrying a concealed dangerous instrument is not a lesser included offense of carrying a concealed deadly weapon, it is a lesser offense by virtue of the reduced penalties. The State may elect to charge one with carrying a concealed dangerous instrument even though the instrument is a deadly weapon as listed under §222(5). Since a deadly weapon is a dangerous instrument per se, there is no need in such a case to prove its use, attempted use or threatened use at the time of the incident. However, if a person is charged with carrying a concealed deadly weapon, he may not, pursuant to Upshur, seek to reduce, by the lesser included offense route, the charge to carrying a concealed dangerous instrument.

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[7] 11 Del.C., §206 provides in part:
"§206. Method of prosecution when conduct constitutes more than one offense.
* * * * *
(b) A defendant may be convicted of an offense included in an offense charged in the indictment or information. An offense is so included when:
(1) It is established by the proof of the same or less than all the facts required to establish the commission of the offense charged.
. . ."

It has been a common practice for the State to allow a defendant who has been charged with carrying a concealed deadly weapon to plea guilty under a plea bargain to the lesser offense of carrying a concealed dangerous instrument. Should such a plea bargain be presented before you, as the presiding judge, you should ensure that the warrant is amended to reflect a carrying a concealed dangerous instrument charge since, under Upshur, carrying a concealed dangerous instrument is not a lesser included offense of carrying a concealed deadly weapon.

* * * * *

The issue of concealment was discussed in the case of State v. Manganaro, Del.Super., IN80-10-0263, 0264, 0265, 0266, 0268, 0269 and IN81-11-0889 (letter opinion by J. Christie dated June 24, 1981). Although the Manganaro case dealt with a loaded gun, a deadly weapon, and, thus, a Carrying concealed a deadly weapon (CCDW) charge, the case has equal applicability with regard to a Carrying concealed a dangerous instrument (CCDI) charge. In Manganaro, a New Castle County Detective approached a vehicle stopped on the roadway on Route 13, south of St. George's Bridge. The vehicle's engine was off and the headlights were on. The defendant was slumped over the steering wheel. The detective opened the driver's side door and

observed what he believed to be a pistol grip sticking out of the waistband of the defendant's pants.

The Detective seized the object which turned out to be a .357 Dan Wesson revolver. Upon a quick inspection of the immediate area within the vehicle, the Detective found a blackjack under the driver's seat.

The defendant was arrested on an outstanding traffic warrant and subsequently was also charged with two counts of CCDW, (the gun and the blackjack). Prior to trial, he moved to dismiss the CCDW charge relating to the .357 revolver, contending that said weapon had not been "concealed". Judge Andrew Christie denied the motion, stating as follows:

> "The defendant takes the position that, as a matter of law, the facts of this case do not show that he was carrying on or about his person a concealed deadly weapon. In order for the State to make out a prima facie case of carrying a concealed deadly weapon, it must be shown that: 1) the weapon was concealed, 2) the weapon was deadly, 3) the defendant had knowledge of its presence and control over it, and 4) the gun was immediately accessible to him. See, Dubin v. State, Del.Supr., 397 A.2d 132 (1979); Ross v. State, Del.Supr., 232 A.2d 97 (1967). In the instant case, the latter three elements are clearly established or, at least, can properly be inferred from the evidence presented at the preliminary hearing. Evidence as to the concealment of the weapon was found to exist both by the Grand Jury and the Judge presiding over the preliminary hearing. Decisions of the Grand Jury and findings announced at preliminary hearings are normally challenged by way of trial and not by the pursuit of pretrial motions such as the instant motion to dismiss. There is no such thing as a motion for summary judgment in a criminal case.

> Although I need not finally resolve the matter at this stage of the proceeding, I find that the State has presented sufficient evidence to sustain a finding that the gun was 'concealed'. As the gun was partially tucked in the defendant's waistband and obscurred from view due to the closed door of the automobile, evidence has been presented on which a jury could find the gun to have been concealed. The test of whether a gun[8] is concealed is: was the placement of the weapon such that one who came near enough to the accused to see it could see it by 'ordinary observation' under existing conditions.[9] See, Smith v. State, Md.Ct.App., 308 A.2d 442, 444 (1973). There is little logical distinction between carrying a weapon in your belt beneath a coat and carrying it in your belt while sitting in a car, where the car, rather than the coat, may contribute to its concealment. In each instance, the placement of the gun could conceal it so that an approaching person would be exposed to the possible danger of a surprise attack with a deadly weapon. See, Dubin v. State, Del.Supr., 397 A.2d 132, 134 (1979). In the instant case, the trier of fact must determine the concealment issue.
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> . . . [T]he defendant's motion to dismiss the charge of carrying a concealed deadly weapon (the gun) is denied. IT IS SO ORDERED." (Emphasis added.)

In the case of Lively v. State, Del.Supr., 427 A.2d 882 (1981), our Supreme Court recognized that a deadly weapon did not have to

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[8] Or any other deadly weapon or dangerous instrument.

[9] If another person, upon approaching the accused, could see the weapon by ordinary observation under existing conditions, then the weapon would be considered as not being concealed. If another person, upon approaching the accused could not see the weapon or enough of it to recognize it as a weapon, by ordinary observation under existing conditions, then the weapon would be considered as being concealed.

be totally concealed so as to meet the concealment element. By implication, the same would apply with regard to a dangerous instrument. The facts of the Lively case are as stated in said opinion:

> "The defendant Lorenzo Lively was arrested, along with a companion, at a department store on charges relating to the fraudulent use of a stolen credit card. During a custodial search of the defendant's person by the police, keys to a Cadillac automobile were discovered. When questioned about the keys, the defendant admitted to having driven a Cadillac automobile to the store's parking lot that day.
>
> Shortly thereafter, the arresting police officer returned to the store's parking lot in the company of the defendant's wife so that she could identify the automobile and drive it home. She was unable to offer proof of ownership of the car, however, and upon a police computer check, it was learned that the automobile was registered in the name of an unidentified third party. Suspecting that the automobile had been stolen, the officer decided to impound the automobile and proceeded to make a routine inventory search thereof at the parking lot. In so doing, he saw 'something exposed -- partially exposed -- underneath the [driver's] floor mat, and when I lifted it up, there was the gun.' The gun was seized and, thereupon, the defendant was charged under §1442. The defendant appeals his conviction on that charge."

After his conviction of CCDW in the Superior Court, Lively appealed to the Delaware Supreme Court, contending that there was insufficient evidence to support the conviction. Chief Justice Daniel L. Herrmann, writing for the Court, found the contention to be without merit:

> "The defendant contends that there was insufficient evidence to support the conviction. This contention is . . . without merit.

> The elements of the offense may be proved by circumstantial evidence. Ross v. State, Del.Supr., 232 A.2d 97 (1967). A loaded handgun was found under the floormat on the driver's side of the car which the defendant admitted that he had driven to the parking lot shortly before. The searching officer testified that the gun was almost totally concealed. Another officer testified that the gun was loaded and in working condition. The jury was warranted in concluding from the evidence that the handgun found was both concealed and deadly; that the defendant had knowledge of its presence and control over it, compare Ross v. State, supra; and that the gun was sufficiently available and accessible to the defendant, when he drove the car, to have been 'about his person' for purposes of §1442. See Dubin v. State, Del.Supr., 397 A.2d 132, 134-35 (1979); compare Modesto v. State, Del.Super., 258 A.2d 287 (1969).
>
> We conclude that the evidence, viewed in its entirety and including all reasonable inferences, was amply sufficient to warrant a finding by the jury that the charge was established beyond a reasonable doubt. See Holden v. State, Del.Supr., 305 A.2d 320 (1973)."

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In the case of Dubin v. State, Del.Supr., 397 A.2d 132 (1979), the defendant appealed his CCDW conviction to the Delaware Supreme Court, contending that the pistol in question which had been concealed in a dashboard glove compartment of the vehicle which the defendant had been operating at the time of his arrest was not "upon or about his person" as a matter of law. Chief Justice Daniel L. Herrmann, writing for the Court, defined the phrase "upon or about his person" as follows:

"The phrase 'upon or about his person' appears in the statutes prohibiting the carrying of concealed weapons in many jurisdictions. In construing a similar statute, the Louisiana Supreme Court concluded that the terms 'on or about' were interchangeable. State v. Brunson, 162 La. ____, 111 So. 321, 50 A.L.R. 1531 (1927). We find such interpretation unacceptable because it would make the word 'about' mere surplusage; and 'under familiar principles of statutory construction effect must be given, if possible, to every part of the statute so that no part will be inoperative.' DiSabatino v. Ellis, Del.Supr., 184 A.2d 469, 472 (1962).

Although 'upon . . . the person' implies physical contact, the term 'about the person' does not require bodily contact. In Modesto v. State, Del.Super., 258 A.2d 287 289 (1969), it was held that bodily contact with the weapon was not necessary for a conviction under §1442. If bodily contact with the weapon is not required, the question then becomes this: how distant can a weapon be from a defendant, and still be considered 'about his person'?

The purpose of the General Assembly, in enacting this Statute originally in 1881 (when, as now, carrying a deadly weapon unconcealed seemed no criminal offense) was to remove the 'temptation and tendency' to use concealed deadly weapons under conditions of 'excitement.' See State v. Costen, Del. Ct.Gen.Sess., 39 A. 456 (1897); State v. Chippey, Del.Ct.Gen.Sess., 33 A. 438 (1892). The legislative purpose, originally and presently, seems to be the avoidance of a deadly attack against another by surprise.

In the light of such legislative intent, we hold that the key to whether a concealed deadly weapon may be deemed to be 'about' the person should be determined by considering the immediate availability and accessibility of the weapon to the person.

> . . . [T]he factual question of whether the pistol in the glove compartment of the automobile being driven by the defendant was 'about his person' must be determined by a finding of whether the gun was available and accessible to the defendant for his immediate use.
>
> Although not determinative of the issue, the following factors are to be considered in deciding the issue of accessibility.
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> (1) Would the defendant have to appreciably change his position in order to reach the weapon?
>
> (2) Could the defendant reach the weapon while driving?
>
> (3) How long would it take for the defendant to reach the weapon, if the defendant were provoked?
>
> If, after considering the totality of the facts of the case in the light of these and other pertinent factors, it is concluded by the fact-finder that the weapon was not immediately available and accessible to the defendant, the defendant may not be convicted under §1442. On the other hand, if it were concluded that the weapon was immediately accessible to the defendant, then the State will have made its prima facie case for violation of §1442."

Knowledge of the presence of the weapon in CCDW cases and knowledge of the presence of the dangerous instrument in CCDI cases and some type of control over it are essential to a conviction under §§1442 and 1443. The case of Ross v. State, Del.Supr., 232 A.2d 97 (1967) stands for the proposition that such knowledge may be proved by circumstantial evidence. In Ross, the evidence against the defendant was summarized as follows:

"On September 24, 1966, Police Officer Logullo stopped a car which had been stolen. At that time it was being driven by Melvin Burley, for whom a warrant had been issued. The appellant, Carl Ross, was riding in the front seat. After being stopped, the occupants got out of the car and stayed with Officer Logullo until the arrival of a patrol wagon some three minutes later. Officer Gears searched the person of Burley and found four sawed-off shot gun shells in his pocket but no revolver shells. Officer Curties escorted Ross to the rear of the patrol wagon where the officer searched him but found nothing. He then placed Ross inside the wagon, and, after closing the door, saw two .38 caliber revolver shells on the ground beneath the step of the wagon. Upon searching the car, the officers found a sawed-off shot gun under the center of the front seat of the car and a .38 revolver under the right side of the front seat where Ross had been sitting."

The defendant, on appeal before our Supreme Court, contended that there was insufficient evidence to show that the revolver was owned by him or had been in his actual possession at any time, or that he knew the revolver was in the vehicle. His contention was rejected as follows:

"We agree that knowledge of the presence of the weapon and some type of control over it are essential to a conviction under the statute. 94 C.J.S. Weapons §8, p. 493; cf. Flamer v. State, Del., 227 A.2d 123. Those elements, however, may be proved by circumstantial evidence. We think the circumstances here are sufficient to justify the belief that Ross knew of the weapon and had some control over it. . . . The revolver shells were found at or very near the spot where Ross had been standing when searched; it is reasonable to believe that they had been in his possession and were dropped accidentally or purposely by him. That possession, coupled with the presence of the revolver directly under the part of the seat where he had been sitting, is sufficient to justify the finding made by the trial Judge."

In other words, knowledge may be inferred from the surrounding circumstances of the crime. See, 11 Del.C., §307; Upshur v. State, supra.

* * * * *

Based upon the judicial interpretation of the CCDW and CCDI statutes as set forth above, is it legally permissible to charge and convict the following three defendants of CCDI?

1. Defendant No. 1: Defendant is arrested for Reckless driving. He is asked by the arresting officer to step out of his vehicle. As he does so, the officer notices the end of what appears to be a handle protruding from under the driver's seat. He reaches down and removes an ice pick. He arrests the defendant for CCDI.

Answer: Yes. An ice pick is a deadly weapon. 11 Del.C., §222(5). A deadly weapon is a dangerous instrument per se. The State may elect to charge a defendant with CCDI even though the instrument is classified as a deadly weapon such that a CCDW charge could have been lodged. When a defendant is charged with CCDI and the instrument is a deadly weapon, no proof of use, attempted use or threatened use need be shown. Ciprick v. State, supra. Even though the ice pick was not totally concealed, the concealment element was met since its placement was such that one who came near enough to the defendant to see it could not see it by ordinary observation under the existing conditions so as to identify it for what is was. State v. Manganaro, supra, Lively v. State, supra.

2. Defendant No. 2: The defendant runs up to a neighbor shouting that he, the defendant, is going to kill said neighbor for backing his car into the defendant's tomato garden. While threatening the neighbor, he raises a broken-off table leg above his head in a threatening manner. He obtained the table leg from the ground at the scene of the fracas. The defendant was arrested on charges of Terroristic threatening and CCDI.

Answer: No. There was no concealment of the table leg; thus, the defendant could not be convicted of CCDI since an element of said offense is that the instrument was concealed.

3. Defendant No. 3: Same facts as set forth in example 2 above except here, the defendant retrieved the table leg from under his right trousers' leg where the instrument had been tucked between his right leg and right sock. The defendant was arrested on charges of Terroristic threatening and CCDI.

Answer: Yes. First, the instrument was a dangerous instrument since it is an article which, under the circumstances in which it was threatened to be used, was readily capable of causing serious physical injury. Second, the instrument was concealed. Third, the defendant had knowledge of its presence and control over it. Fourth, the instrument was immediately available and accessible to him.

If any of your answers vary from the above, it is suggested that you further digest the contents of this Legal Memorandum which

contains the legal principles upon which the suggested answers are predicated.

MAB:pm

cc: The Honorable Daniel L. Herrmann
The Honorable Grover C. Brown
The Honorable Albert J. Stiftel
The Honorable Robert H. Kahl
The Honorable Robert D. Thompson
The Honorable Alfred Fraczkowski
The Honorable Richard S. Gebelein
The Honorable Lawrence M. Sullivan
The Honorable Richard J. McMahon, State Prosecutor
Norman E. Veasey, Esquire, Pres., Delaware State Bar Assoc.
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